

BEFORE THE DEPARTMENT  
OF PUBLIC SERVICE REGULATION  
OF THE STATE OF MONTANA

In the matter of the proposed	)	NOTICE OF PUBLIC
amendment of ARM 38.2.5001,	)	HEARING ON PROPOSED
38.2.5002, 38.2.5004, 38.2.5007,	)	AMENDMENT AND REPEAL
38.2.5008, 38.2.5014, 38.2.5015,	)	
38.2.5017, 38.2.5021, 38.2.5022,	)	
38.2.5023, 38.2.5024, 38.2.5028,	)	
38.2.5030, and the proposed repeal of	)	
ARM 38.2.5016, 38.2.5020, 38.2.5027	)	
pertaining to Protective Orders and	)	
Protection of Confidential Information	)	

TO: All Concerned Persons

1. On July 26, 2007, at 9:00 a.m., a public hearing will be held in the Bollinger Room, Public Service Commission (commission) offices, 1701 Prospect Avenue, Helena, Montana, to consider the proposed amendment and repeal of the above-stated rules.

2. The commission will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the commission no later than 5:00 p.m. on July 16, 2007, to advise us of the nature of the accommodation that you need. Please contact Connie Jones, commission secretary, 1701 Prospect Avenue, P.O. Box 202601, Helena, Montana 59620-2601, telephone number (406) 444-6170, TTD number (406) 444-6199, fax number (406) 444-7618, e-mail [conniej@mt.gov](mailto:conniej@mt.gov).

3. The rules proposed to be amended provide as follows, new material underlined, stricken material interlined:

38.2.5001 DEFINITIONS Terminology used in these rules has the following meanings, except where the context clearly indicates otherwise:

(1) "Confidential information" means information that the commission may lawfully withhold from public disclosure by issuing a protective order in accordance with these rules;

(2) "Consumer counsel" means the Montana consumer counsel and staff of the Montana consumer counsel;

(3) "Information" includes knowledge, observations, opinions, data, facts, and the like, whether recorded or communicated in writing, orally, electronically, or otherwise, and whether provided through pleadings, reports, exhibits, testimony, work papers, or similar items or attachments to such items, or in response.

(4) "Legal counsel" means an individual authorized to practice law before the commission in a proceeding in which a protective order has been issued, and who

represents a party to the proceeding:

(4-5) "Provider" or "providing party" means the person in possession of confidential or claimed confidential information who requests a protective order; and

(5-6) "Requesting party" means the person requesting access or granted access to confidential information.

AUTH: 69-3-103, MCA

IMP: 69-3-105, MCA

REASON: There is a reasonable necessity to amend to define "legal counsel" in the specific context of these rules. Without this definition there could be confusion over the meaning of "legal counsel" in some of the rules, and assertions of rights granted by the rules that are not intended by the commission.

38.2.5002 PROTECTIVE ORDERS AND RULES--RELATIONSHIP, WAIVER, SPECIAL PROVISIONS, INAPPLICABILITY (1) If conflict exists between these rules and a protective order, the protective order controls.

(2) Requests for waiver of one or more of these rules will not be routinely granted, but may be granted for good cause. Requests for waiver must include a concise statement of the reasons supporting for the request.

(3) Requests that special provisions or terms and conditions not provided by these rules be included in a protective order will not be routinely granted, but may be granted for good cause. Requests for special provisions or terms and conditions must include proposed language and a concise statement of the reasons supporting for the request.

(4) These rules do not apply to all information in the possession of the commission which may be lawfully withheld from public disclosure. Generally, these rules apply to confidential information necessary to commission regulation and decision-making, normally but not exclusively in a contested case process. Information to which these rules do not apply includes agency personnel records or identities of certain informants or complainants. Also, these rules do not apply to access to information, access to which that will create a risk of personal safety or impede law enforcement efforts.

AUTH: 69-3-103, MCA

IMP: 69-3-105, MCA

REASON: There is reasonable necessity to amend in order to simplify and clarify language.

38.2.5003 PROTECTION OF INFORMATION--"90-DAY RULE"  
(REPEALED) (History: 69-3-103, MCA; IMP, 69-3-105, MCA; NEW, 2000 MAR p. 2037, Eff. 7/28/00; REP, 2004 MAR p. 2592, Eff. 10/22/04.)

38.2.5004 PROVISIONAL TERM PROTECTIVE ORDERS (1) On the motion of a provider, the commission may issue a provisional "term protective

order," which is a provisional protective order applicable to specific confidential information expected to be required periodically by the commission. An example of such information would be information supplied in response to routine or repetitive reporting requirements, such as commission annual reports or information required by special commission order. A provisional term protective order may be effective for a period of not more than four years. ~~The requirements for requesting, for issuing, and for gaining access to confidential information under a term protective order are the same as the requirements applicable to protective orders under these rules.~~ The requirements for requesting and issuing a provisional term protective order are the same as the requirements applicable to provisional protective orders under ARM 38.2.5007(6). When a provisional term protective order is issued, providers may submit applicable information under the terms of that order. The process for deciding whether to issue a protective order covering that information will be the same as described at ARM 38.2.5007(7).

AUTH: 69-3-103, MCA  
IMP: 69-3-105, MCA

REASON: There is a reasonable necessity to amend this rule in order to make the process for term protective orders consistent with the amended process for protective orders at ARM 38.2.5007.

Rules 38.2.5005 and 38.2.5006 reserved

38.2.5007 PROTECTIVE ORDER--REQUESTS, TIMING OF REQUESTS, AND PROCEDURE (1) Confidential information will be protected only on commission approval of a request by a provider.

(2) Prior to requesting a protective order, the provider must determine, following a thorough legal and factual examination, that all information claimed to be confidential is a trade secret or otherwise legally protectible.

(3) ~~The factual showing facts and legal analysis contained in a request for protective order must make a prima facie showing and must make clear to the commission the basis for the claim of confidential request, and must make a prima facie showing of confidentiality. information. A provider has the burden of demonstrating that information is confidential information. Unless the commission has granted a waiver pursuant to ARM 38.2.5002, t~~The request for protective order must include:

(a) an identification of the person, including contact information (phone number and e-mail address) to whom communications from commission staff, parties, and interested persons may be made;

(b) a complete and specific nonconfidential identification, description, and explanation of the information, item by item or by category of items which are alike, of all information for which protection is requested, suitable for meaningful use in testimony, arguments, public discussion, orders, and the public record;

(c) a complete and specific factual basis, ~~including a thorough identification and explanation of the specific facts,~~ supported by affidavit of a qualified person, that supports a the claim of confidential information; and

(d) a complete and specific legal analysis, explaining why the information is confidential information.

(4) Requests for a protective order must demonstrate the following:

(a) If the claimed basis for protection is individual privacy, that:

(i) the provider has made a reasonable effort to contact the individual to ascertain whether the individual waives the right to privacy for the information at issue;

(ii) the individuals with potential privacy interests have actual, subjective expectations of privacy in the information at issue;

(iii) the information is ~~in fact~~ secret;

(iv) the demand of individual privacy clearly exceeds the merits of public disclosure.

(b) If the claimed basis for protection is trade secret, that:

(i) prior to requesting a protective order, the provider has considered that the commission is a public agency and that there is a constitutional presumption of access to documents and information in the commission's possession;

(ii) the claimed trade secret material is information;

(iii) the information is in fact secret;

(iv) the secret information is subject to efforts reasonable under the circumstances to maintain its secrecy;

(v) the secret information is not readily ascertainable by proper means; and

(vi) the information derives independent economic value from its secrecy, or that competitive advantage is derived from its secrecy.

(5) If there are bases for confidential information other than individual privacy or trade secret, requests for protection must explain, and demonstrate compliance with, the legal standards required for protection.

(6) ~~Prior to issuing a protective order the commission will~~ After reviewing the demonstrations made pursuant to (3), (4), and (5), and may if necessary, questioning a provider on those demonstrations, the commission for cause will either decline to issue a protective order, or will issue a provisional protective order to the provider.

(7) ~~A request for protective order must not include the claimed confidential information. Generally, claimed confidential information must not be filed at the commission before the issuance of a requested protective order. If it is necessary for the commission to access claimed confidential information prior to the issuance of a protective order, such access will be by special commission order. Following receipt of a provisional protective order the provider must immediately file the claimed confidential information with the commission. The commission will review the information in camera, and for cause will either decline to issue a protective order for all or part of the information, or will issue a protective order for all or part of the information. If the commission declines to issue a protective order for all or part of the information, the claimed confidential information for which a protective order was not issued will be returned to the provider. A provisional protective order will remain in force for the duration of the commission proceeding in which it is issued, for the purpose of commission review of all claimed confidential information, that is within the scope of the provisional protective order, submitted periodically during the course of the proceeding.~~

(8) The commission will notice ~~each request~~ requests for protective orders, and the issuance of protective orders, on its weekly agenda. ~~When the commission determines that a request for protective order constitutes a prima facie showing that the information is confidential information, it will issue a protective order. Notice of issuance of protective orders will be given in the next commission weekly agenda.~~

(9) In the interests of preventing delays in proceedings, the commission encourages providers to make requests for protection of confidential information at the earliest possible time in a proceeding, including in anticipation of a proceeding if the provider knows that claimed confidential information will be submitted in the proceeding. Failure to heed this section may result in a commission conclusion that a filing is incomplete, which in turn may change the anticipated date on which a commission decision will issue.

AUTH: 69-3-103, MCA

IMP: 69-3-105, MCA

REASON: There is reasonable necessity to amend in order to improve, simplify, and clarify language at ARM 38.2.5007(3)(c), 38.2.5007(4)(b)(iii), 38.2.5007(5), and 38.2.5007(8). There is a reasonable necessity to remove the second sentence at ARM 38.2.5007(3) because it is unnecessary in that section. The sentence has been moved to a new ARM 38.2.5008(4), where a statement on the imposition of burden in this context is more correctly placed. See the "reason" explanation for the proposed amendments to ARM 38.2.5008. There is a reasonable necessity to amend ARM 38.2.5007(6) and (7) to add a step to require a review of the claimed confidential information before granting a protective order. This additional step appears to be required by the Montana Supreme Court in Great Falls Tribune v. Public Service Commission and Montana Power Company, 2003 MT 359, paragraph 57, 319 Mont. 38, paragraph 57, 82 P. 3d 876, paragraph 57. There is a reasonable necessity to amend ARM 38.2.5007(3)(b) in order to move the requirement at ARM 38.2.5016, which the commission proposes to repeal, to ARM 38.2.5007. The commission deems it better to require that this information be provided in the pleadings than on the submission of protected information.

38.2.5008 PROTECTIVE ORDER--ISSUANCE, RECONSIDERATION, CHALLENGE TO CONFIDENTIALITY, BURDEN ON PROVIDER, NOTICE OF CHANGE OF STATUS OF PROTECTED INFORMATION (1) Protective orders will include all or part of these rules by reference, will include a general non-confidential description of the protected information, may waive certain of these rules and may include special terms and conditions.

(2) Challenges to a protective order must be in accordance with (3).

(3) Protective orders establish a procedure for handling confidential information. Issuance of a protective order means the commission has determined at least that the ~~provider has shown good and sufficient cause in fact and law, i.e., request for protective order conforms to these rules, and makes~~ has made a prima facie showing, that the information for which protection is requested is confidential information. A person ~~or entity~~ with proper standing, or the commission on its own motion, may challenge a request for protective order or a protective order ~~at any~~

time by using the following procedure:

(a) A motion and supporting memorandum challenging a protective order or a request for a protective order must be filed with the commission and served on the providing party. The providing party must file a response to the motion within 40 ten business days of service. Service means physical delivery or deposit in the mail. If necessary, following receipt of the response the commission will set the challenge for hearing. ~~Requests for hearing or oral argument may be granted for good cause, or may be scheduled on the commission's own motion.~~

(b) If the commission determines that information should be removed from protection, the information will remain protected under the governing protective order for a reasonable period, to be established in the commission ruling, to allow the provider time to appeal the commission decision. (History: 69-3-103, MCA; IMP, 69-3-105, MCA; NEW, 2000 MAR p. 2037, Eff. 7/28/00; AMD, 2002 MAR p. 3330, Eff. 11/28/02; AMD, 2004 MAR p. 2592, Eff. 10/22/04.)

(4) A provider has the burden at all times of demonstrating that information is confidential information.

(5) On becoming aware that there is no longer a legal or factual basis to protect information covered by commission protective order, the provider must immediately notify the commission so that such information can be made public.

AUTH: 69-3-103, MCA

IMP: 69-3-105, MCA

REASON: There is reasonable necessity to amend in order to improve and clarify certain language. The new language at ARM 38.2.5008(4) was previously at ARM 38.2.5007(3). At ARM 38.2.5007(3) this language was redundant because the placement of the burden on the provider is implicit in the requirement to make a prima facie showing. It is necessary at ARM 38.2.5008 to make clear that the burden of demonstrating confidentiality remains on the provider at all times when information is withheld from public disclosure. There is reasonable necessity to add the requirement at ARM 38.2.5008(5) in order to ensure, to the extent possible, that the commission does not protect any information that is not legally protectible.

Rule 38.2.5009 reserved

38.2.5010 PROTECTIVE ORDER--EXTENSION TO ADDITIONAL INFORMATION, EXTENSION TO OTHER PROVIDERS (REPEALED) (History: 69-3-103, MCA; IMP, 69-3-105, MCA; NEW, 2000 MAR p. 2037, Eff. 7/28/00; REP, 2004 MAR p. 2592, Eff. 10/22/04.)

Rule 38.2.5011 reserved

38.2.5012 NONDISCLOSURE AGREEMENTS--GENERAL (1) All persons, including legal counsel, having a right pursuant to protective order to access confidential information, shall sign and file with the commission and serve on the provider a nondisclosure agreement, on a form as attached to each protective order, prior to receiving or reviewing the confidential information.

(2) Commissioners and commission staff shall sign a "commission nondisclosure agreement" which must certify, permanently and for all confidential information in all proceedings before the commission, in substantial compliance with the following:

"I understand that in my capacity as commissioner or commission staff, I may be called upon to access, review, and analyze, information that is protected as confidential information. I have reviewed all commission rules applicable to protection of confidential information and I am familiar with the standard terms and conditions of protective orders issued by the commission. I understand and will abide by my obligations in regard to confidential information.

"I agree that I will use confidential information only for commission purposes and I will discuss and disclose confidential information only with the provider and persons, including commissioners and commission staff, having also signed a nondisclosure agreement. I agree to be bound by the terms and conditions of protective orders and these rules. I will neither use nor disclose protected information except for lawful purposes in accordance with the governing protective order and these rules so long as such information remains protected.

"I understand that this nondisclosure agreement may become part of my permanent personnel file and the files of the division to which I am assigned and may be freely copied and distributed to other files and persons having interest in it, including the provider and other parties in proceedings before the commission."

(3) Counsel, expert witnesses, and others entitled to access confidential information for parties to a proceeding in which a protective order has been issued shall sign and file with the commission, and on the same day must serve on the provider, a nondisclosure agreement, on a form as attached to each protective order, certifying in substantial compliance with the following:

"I understand that in my capacity as counsel or expert witness for a party to this proceeding before the commission, or as a person otherwise lawfully so entitled, I may be called upon to access, review, and analyze information that is protected as confidential information. I have reviewed all commission rules and protective orders governing the protected information that I am entitled to receive. I fully understand, and agree to comply with and be bound by, the terms and conditions thereof. I will neither use nor disclose confidential information except for lawful purposes in accordance with the governing protective order and commission rules so long as such information remains protected.

"I understand that this nondisclosure agreement may be copied and distributed to any person having an interest in it and that it may be retained at the offices of the provider, commission, consumer counsel, or any party and may be further and freely distributed."

(4) Nondisclosure agreements must include the name, employer, and business address of the person signing and the name of the party represented by the person. (History: 69-3-103, MCA; IMP, 69-3-105, MCA; NEW, 2000 MAR p. 2037, Eff. 7/28/00; AMD, 2004 MAR p. 2592, Eff. 10/22/04.)

Rule 38.5.5013 reserved

38.2.5014 PROTECTIVE ORDER--STANDARD TERMS AND CONDITIONS

--GENERAL (1) Confidential information must not be provided to, disclosed to, discussed with, or accessed by any person, including legal counsel, who has not first signed a commission-approved nondisclosure agreement, thereby agreeing to access, maintain, use, and disclose confidential information in strict accordance with the governing protective order and these rules. All persons who are entitled to receive or access confidential information shall neither use nor disclose the confidential information for any purpose other than the purposes of preparation for and conduct of the proceedings before the commission; in which the protective order has been issued, and then solely as contemplated in the governing protective order and these rules, and shall take reasonable precautions to keep the confidential information secure in accordance with the purposes and intent of the protective order and these rules.

AUTH: 69-3-103, MCA  
IMP: 69-3-105, MCA

REASON: There is a reasonable necessity to amend this rule to include a requirement stated at ARM 38.2.5020(2), thereby making ARM 38.2.5020 redundant and justifying its repeal.

38.2.5015 PROTECTIVE ORDER--STANDARD TERMS AND CONDITIONS

--IDENTIFICATION OF CONFIDENTIAL INFORMATION (1) Except as otherwise ordered by the commission, confidential or claimed confidential information must be provided and maintained at all times on yellow paper, and must be clearly marked and maintained as marked in a fashion substantially equivalent to "confidential – subject to protective order, [or provisional protective order] PSC Docket No. (insert docket number)" and may include additional markings not inconsistent with the governing protective order and these rules.

(2) On request and for good cause the commission will authorize the provision of confidential or claimed confidential information through a medium other than yellow paper.

AUTH: 69-3-103, MCA  
IMP: 69-3-105, MCA

REASON: There is a reasonable necessity to amend to reflect the new review process at ARM 38.2.5007(6) and (7), and to account for situations when it may not be practical or possible to provide information on yellow paper.

38.2.5016 PROTECTIVE ORDER--STANDARD TERMS AND CONDITIONS

--PROVIDING CONFIDENTIAL INFORMATION--NON-CONFIDENTIAL WRITTEN SUMMARY (1) ~~For all confidential information supplied under protective order, the provider must prepare for each item of information a concise, written, non-confidential description and summary suitable for meaningful inclusion in party testimony and arguments, commission orders, and the public record of the proceeding. The description and summary must be filed and served within five days~~



of the filing and service of the confidential information to which it relates. (History: 69-3-103, MCA; ~~IMP~~, 69-3-105, MCA; ~~NEW~~, 2000 MAR p. 2037, Eff. 7/28/00; ~~AMD~~, 2004 MAR p. 2592, Eff. 10/22/04.)

REASON: There is a reasonable necessity to repeal this rule because the requirement to file a non-confidential summary of claimed confidential information is now at 5007(3)(b).

~~38.2.5017 PROTECTIVE ORDER--STANDARD TERMS AND CONDITIONS  
--PROVIDING CONFIDENTIAL INFORMATION--GENERAL~~ (1) On request of a requesting party, the provider shall provide confidential information pursuant to the governing protective order. The commission and all requesting parties having access to confidential information shall take appropriate action in good faith to mitigate the effect of provider errors in supplying confidential information, such as mismarking or misdirecting, upon discovery of the error or upon notice of the error by the provider or the commission.

(2) Except as described at ARM 38.2.5023 and below, confidential information is only available from the provider and only available in accordance with the governing protective order, and confidential information is not to be obtained from the commission or others, including the consumer counsel. However, the commission may allow inspection of confidential information maintained at the commission office, by any person having signed, filed with the commission, and served on the provider a nondisclosure agreement ~~40~~ ten days before asking to inspect the confidential information.

AUTH: 69-3-103, MCA  
IMP: 69-3-105, MCA

REASON: There is a reasonable necessity to amend this rule in order to clarify by adding a reference to ARM 38.2.5023.

Rules 38.2.5018 and 38.2.5019 reserved

~~38.2.5020 PROTECTIVE ORDER--STANDARD TERMS AND CONDITIONS  
--MAINTENANCE AND USE OF CONFIDENTIAL INFORMATION--GENERAL~~

~~(1) The commission and other persons having lawful access to confidential information may access confidential information in accordance with the governing protective order. The commission and other persons having lawful access shall at all times maintain and process the confidential information in strict accordance with the governing protective order.~~

~~(2) Confidential information must not be used except for purposes of the proceeding in which the protective order is issued. (History: 69-3-103, MCA; ~~IMP~~, 69-3-105, MCA; ~~NEW~~, 2000 MAR p. 2037, Eff. 7/28/00; ~~AMD~~, 2004 MAR p. 2592, Eff. 10/22/04.)~~

REASON: There is a reasonable necessity to repeal this rule because it repeats requirements, terms, and conditions stated at 5014, as amended.

38.2.5021 PROTECTIVE ORDER--STANDARD TERMS AND CONDITIONS  
--USE OF CONFIDENTIAL INFORMATION -- GENERAL

(1) Where written or oral reference to confidential information is required, reference must be by general citation of title or exhibit number or by nonconfidential description and summary, such as the nonconfidential summary supplied by the provider pursuant to ARM 38.2.5007(3)(b). If further reference to confidential information is necessary, oral reference must be presented in camera and written reference must be separated, clearly marked, filed with the commission in a sealed envelope ~~under seal~~, and served only on legal counsel of record for each party.

(2) Where reference to confidential information is required in a commission decision, every effort will be made to make such reference through nonconfidential summary. If it is not possible to make such reference by nonconfidential summary, such reference must be separated, clearly marked, placed in a sealed envelope, and served only on legal counsel of record for each party.

(3) Where in camera proceedings are recorded, stenographically or otherwise, the recording and all transcription of the recording must be separated, clearly marked, sealed in an envelope, and ~~maintained in accordance with the governing procedural order~~ served on the commission and legal counsel for each party who has ordered a record of the proceedings. The person recording the in camera proceeding and the person transcribing the recording of the in camera proceeding must comply with the governing protective order and must sign a nondisclosure agreement.

AUTH: 69-3-103, MCA

IMP: 69-3-105, MCA

REASON: There is a reasonable necessity to amend this rule in order to provide an internal reference; to make the rule language consistent with other rules and with the new definition of "legal counsel;" and to clarify existing language, remove unnecessary language, and clarify who may receive transcription of confidential information.

38.2.5022 PROTECTIVE ORDER--STANDARD TERMS AND CONDITIONS  
--ACCESS AND MAINTENANCE OF CONFIDENTIAL INFORMATION--

COMMISSION AND CONSUMER COUNSEL (1) Except as otherwise provided by the commission in a protective order, The commissioners, and commission staff, and the requesting parties consumer counsel and consumer counsel staff may have access to all confidential information made available pursuant to protective order, and shall be bound by the terms of the protective order.

(2) While in the custody of the commission or requesting parties ~~consumer counsel~~, confidential or claimed confidential information must remain on yellow paper and remain marked with a clear indication that the information has been designated confidential information in a proceeding before the commission. Confidential or claimed confidential information maintained by the commission will be kept in a separate locked file cabinet, except when commissioners or commission staff are reviewing the information as part of their regulatory responsibilities.

Requesting parties must similarly ensure that confidential information is kept separate and secure, and only accessible by individuals who are lawfully entitled to see the information by the terms of the protective order. ~~sealed and segregated in the files of the commission. Confidential information maintained by the consumer counsel will be sealed and segregated in the files of the consumer counsel.~~

~~(3) The consumer counsel shall have access to all confidential information which is subject to a protective order, so long as access is in accordance with the governing protective order.~~

AUTH: 69-3-103, MCA

IMP: 69-3-105, MCA

REASON: There is a reasonable necessity to amend in order to delete unnecessary references to the consumer counsel; to add language required by the creation of a two step review process at ARM 38.2.5007; and to improve the language of the rule with respect to maintaining and securing confidential information by the commission and requesting parties. The additional language at the beginning of section (1) of this rule is reasonably necessary to accommodate an unusual situation, such as a requirement of a federal agency, federally created entity, or other entity that the commission limit access to confidential information as a condition of receipt of the information.

38.2.5023 PROTECTIVE ORDER--STANDARD TERMS AND CONDITIONS  
--ACCESS AND MAINTENANCE OF CONFIDENTIAL INFORMATION--PARTIES

~~(1) Confidential information must be provided by the provider to legal counsel for the requesting party when legal counsel has signed a nondisclosure agreement agreeing to be bound by the terms of the protective order. The provider, and legal counsel for requesting parties who have been granted access to confidential information, must give confidential information to legal counsel for requesting parties, when legal counsel for requesting parties has signed a nondisclosure agreement pursuant to these rules.~~ Access to confidential information may be authorized by legal counsel to expert witnesses of the requesting party. Except as otherwise agreed to by the provider, the designated expert may not be an officer, director, or employee of any party, or an officer, director, employee, stockholder, or member of an association or corporation of which any party is a member or affiliate. Prior to giving access to an expert, legal counsel shall deliver a copy of the governing protective order and these rules to the expert and the expert shall sign a nondisclosure agreement. A copy of the nondisclosure agreement must be provided ~~to~~ served on the provider.

~~(2) When it is not feasible that confidential information be provided to counsel and experts, confidential information may be made available by the provider for inspection by legal counsel and experts at a place and a time mutually agreed on by the provider and the party, or as directed by the commission.~~

AUTH: 69-3-103, MCA

IMP: 69-3-105, MCA

REASON: There is a reasonable necessity to amend this rule to allow legal counsel for requesting parties to give confidential information to legal counsel for other requesting parties when legal counsel have signed nondisclosure agreements. This amendment corrects the unnecessary and sometimes burdensome requirement that only the provider can grant access to confidential information covered by a protective order.

38.2.5024 PROTECTIVE ORDER--STANDARD TERMS AND CONDITIONS  
--ACCESS AND MAINTENANCE OF CONFIDENTIAL INFORMATION--EMPLOYEE  
EXPERTS OF PARTIES

(1) Legal Counsel for the a requesting party may propose access to confidential information by an employee expert of the requesting party in accordance with the following procedure.

(a) Legal Counsel for the requesting party shall ~~notify~~ serve written notice on the legal counsel for the provider, in writing, of the intent to provide confidential information to an employee expert of the requesting party. The notice must contain the name, title, job description, description of previous positions and experience, and area of expertise of the employee expert accessing the information.

(b) Within ~~five~~ ten business days of the provider's receipt service of notice, the provider must serve on the requesting party in writing either an objection or a statement indicating no objection. if it is the good faith position of the provider that the designated employee expert should not be given access to the information, the provider must object in writing.

(c) If the requesting party does not receive an objection within the time required, receives a statement of no objection, legal counsel for the requesting party may provide access to the information by the designated employee expert in accordance with the governing protective order.

(d) If the requesting party receives an objection within the time required, the requesting party and provider must attempt to resolve the objection. If the parties are unable to resolve the objection, either may apply to the commission, not later than ten business days from the receipt service of the objection by on the requesting party, for a ruling. If neither party applies for a ruling, the provider's objection is deemed granted and the designated employee expert may not be given access to the information. Access to the information shall not be given to the designated employee expert pending ruling by the commission.

(e) The standard applied by the commission in when determining a question of employee expert access to confidential information is whether access would be reasonably likely to jeopardize the confidential nature of the information.

(f) A party dissatisfied with a ruling by the commission may appeal to the district court, and, pending appeal, the information must not be disclosed to the designated employee expert.

(2) To avoid unnecessary delay, counsel for the requesting party proposing access to confidential information by an employee expert should commence the above procedure as early as possible in a proceeding.

(3) All written communication between or among parties that occurs pursuant to this rule must be served on the commission.

(4) Written communication as used in this rule does not include electronic communication. Service of written communication means physical delivery or

deposit in the mail.

AUTH: 69-3-103, MCA

IMP: 69-3-105, MCA

REASON: There is a reasonable necessity to amend this rule to improve and clarify the process for gaining access to confidential information by employee experts.

Rules 38.2.5025 and 38.2.5026 reserved

38.2.5027 PUBLIC ACCESS TO CONFIDENTIAL INFORMATION

~~(1) Access to confidential information by persons other than the commission, the consumer counsel, and parties to a proceeding in which the confidential information has been provided is allowed in accordance with the governing protective order.~~

REASON: There is a reasonable necessity to repeal this rule because it is unnecessary in light of 5028.

38.2.5028 PROTECTIVE ORDER--STANDARD TERMS AND CONDITIONS  
--ACCESS AND MAINTENANCE OF CONFIDENTIAL INFORMATION--PUBLIC

(1) A person not a party to a proceeding in which a protective order has been issued may ~~propose~~ request access to confidential information in accordance with the following procedure.

(a) The person shall ~~notify~~ serve a written request to access confidential information on the commission and legal counsel for the provider, ~~in writing, of the intent to request access to confidential information.~~ The notification request must include the name and address of the person, an identification of the information for which access is requested, the reason access is requested, and the intended use of the information if access is granted.

(b) Within ~~40~~ ten business days of the ~~provider's receipt of service of the request notice, if it is the good faith position of the provider that the person should not be given access to the information, the provider must either object in writing, clearly stating the reasons for the objection, or indicate in writing that the provider has no objection. An objection and statement of no objection must be served on the person and the commission. and copy the objection to the person and the commission.~~

(c) ~~If the person and the commission do not receive an objection within the time required, the person may access the information in accordance with the governing protective order.~~ If the person and the commission receive a statement of no objection, the person may access the protected information in accordance with the governing protective order.

(d) ~~If the person and the commission receive an objection within the time required, the person and the provider shall~~ must attempt to resolve the objection. If unable to resolve the objection, either the person or the provider may apply to the commission for a ruling. Access to the information ~~must~~ will not be given to the person pending ruling by the commission.

(e) The standard applied by the commission in determining a question of access to confidential information is whether access would be reasonably likely to jeopardize the confidential nature of the information.

(f) Dissatisfaction with a ruling by the commission may be appealed to the district court, and, pending appeal, the information must not be disclosed to the designated person.

(2) Written communications as used in this rule does not include electronic communications. Service of written communications means physical delivery or deposit in the mail.

AUTH: 69-3-103, MCA

IMP: 69-3-105, MCA

REASON: There is a reasonable necessity to amend this rule to improve and clarify the process for gaining access to protected information by persons not a party to the commission proceeding in which a protective order has been issued.

Rule 38.2.5029 reserved

38.2.5030 CONFIDENTIAL INFORMATION-RETENTION, RENEWAL OF PROTECTION BY PROVIDER, RETURN TO PROVIDER ~~(1) Confidential information remains protected permanently, whether or not returned to the provider, unless:~~

~~(a) the commission otherwise orders following notice and opportunity to be heard;~~

~~(b) the provider agrees otherwise, in writing, communicated to each person having obtained access to the confidential information; or~~

~~(c) a court having jurisdiction over the subject matter and persons affected otherwise orders.~~

(1) Confidential information subject to commission protective order that is in the possession of the commission, the consumer counsel, or other state agency will be maintained, destroyed, or returned to the provider according to Montana laws governing records management by state agencies.

~~(2) Removal of protection relieves all persons having access to the confidential information from ongoing compliance with the governing protective order and these rules.~~

(3) (2) Except for the commission, and the consumer counsel, or other state agency, and unless the provider agrees to another disposition, all persons having obtained confidential information will return the confidential information to the provider within 45 days of final action, including court action, in the proceeding in which the information was designated confidential; or, in instances where confidential information has been obtained outside a commission proceeding, confidential information shall be returned to the provider within 30 days of obtaining the confidential information. Return of confidential information does not relieve the receiving party or any person having access to the confidential information permanently. from ongoing compliance with the governing protective order and these rules. The consumer counsel, in its discretion, may return confidential

~~information to the provider. The commission may return or destroy confidential information, when no longer required to be maintained by the commission in accordance with laws governing records retention by state agencies.~~

(3) The commission may periodically, in the course of reviewing confidential information in its possession covered by protective order, require that the provider demonstrate, by making a filing consistent with the requirements at ARM 38.2.5007, that the information remains confidential information and lawfully entitled to protection.

AUTH: 69-3-103, MCA

IMP: 69-3-105, MCA

REASON: There is a reasonable necessity to amend this rule in order to remove unnecessary language; to indicate simply that retention of protected information will be pursuant to Montana law; and to indicate that the commission may, recognizing that time may affect the legal basis of protection, periodically require that a provider renew the legal basis for protection.

4. The commission proposes to repeal the following rules:

38.2.5016 PROTECTIVE ORDER--STANDARD TERMS AND CONDITIONS  
--PROVIDING CONFIDENTIAL INFORMATION--NON-CONFIDENTIAL WRITTEN  
SUMMARY found at Administrative Rules of Montana page 38-111.

AUTH: 69-3-103, MCA

IMP: 69-3-105, MCA

REASON: There is a reasonable necessity to repeal this rule because the requirement to file a nonconfidential summary of claimed confidential information is now at ARM 38.2.5007(3)(b).

38.2.5020 PROTECTIVE ORDER--STANDARD TERMS AND CONDITIONS  
--MAINTENANCE AND USE OF CONFIDENTIAL INFORMATION – GENERAL  
found at Administrative Rules of Montana page 38-113.

AUTH: 69-3-103, MCA

IMP: 69-3-105, MCA

REASON: There is a reasonable necessity to repeal this rule because it repeats requirements, terms, and conditions stated at ARM 38.2.5014, as amended.

38.2.5027 PUBLIC ACCESS TO CONFIDENTIAL INFORMATION found at Administrative Rules of Montana page 38-119.

AUTH: 69-3-103, MCA

IMP: 69-3-105, MCA

REASON: There is a reasonable necessity to repeal this rule because it is

unnecessary in light of ARM 38.2.5028.

5. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments (original and ten copies) may also be submitted to Legal Division, Public Service Commission, 1701 Prospect Avenue, P.O. Box 202601, Helena, Montana 59620-2601, and must be received no later than July 26, 2007, or may be submitted to the commission through the commission's web-based comment form at <http://psc.mt.gov> (go to "consumer assistance," "talk to us," "pending proceeding comments," then complete and submit the form) no later than July 26, 2007. (PLEASE NOTE: When filing comments pursuant to this notice please reference "Docket No. L-07.05.1-RUL.")

6. The commission, a commissioner, or a duly appointed presiding officer may preside over and conduct the hearing.

7. The Montana Consumer Counsel, 616 Helena Avenue, P.O. Box 201703, Helena, Montana 59620-1703, phone (406) 444-2771, is available and may be contacted to represent consumer interests in this matter.

8. The commission maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by the commission. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding: electric utilities, providers, and suppliers; natural gas utilities, providers, and suppliers; telecommunications utilities and carriers; water and sewer utilities; common carrier pipelines, motor carriers, and rail carriers; and administrative procedures. Such written request may be mailed or delivered to Public Service Commission, Legal Division, 1701 Prospect Avenue, P.O. Box 202601, Helena, Montana 59620-2601, faxed to Connie Jones at (406) 444-7618, e-mailed to [conniej@mt.gov](mailto:conniej@mt.gov), or may be made by completing a request form at any rules hearing held by the commission.

9. The bill sponsor notification requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was notified by regular mail sent on May 25, 2007.

/s/ Greg Jergeson  
Greg Jergeson, Chairman  
Public Service Commission

/s/ Robin A. McHugh  
Reviewed by Robin A. McHugh

Certified to the Secretary of State June 11, 2007.